

2013 WL 3801066 (La.App. 4 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Fourth Circuit.

6126, L.L.C., James P. Farwell, and G. F. Gay Lebreton, Plaintiffs-Appellees,

v.

Jon Besthoff STRAUSS, Jeffry B. Strauss, and Susan Marie Carman Strauss, Defendants-Appellants.

No. 2013-CA-0853.

July 15, 2013.

On Appeal from the Civil District Court, Parish of Orleans, State of Louisiana

Docket No. 2012-04732, Section “7” Division “F”

Honorable Christopher J. Bruno, Judge, Presiding

A Civil Proceeding

Original Brief on Behalf of Appellants Jon Besthoff Strauss, Jeffry B. Strauss and Susan Marie Carman Strauss

[Robert B. McNeal](#) (Bar No. 14211), [Laura E. Springer](#) (Bar No. 34772), Liskow & Lewis, One Shell Square, 701 Poydras St., Suite 5000, New Orleans, LA 70139-5099, Phone: (504) 581-7979; Fax: (504) 556-4108.

[Stephen P. Schott](#) (Bar No. 2096), [Brodie G. Glenn](#) (Bar No. 33152), Baldwin, Haspel, Burke & Mayer, LLC, 3600 Energy Centre, 1100 Poydras Street, New Orleans, LA 70163, Phone: (504) 569-2900; Fax: (504) 569-2099, Attorneys for Defendants-Appellants Jon Besthoff Strauss, Jeffry B. Strauss, and Susan Marie Carman Strauss.

***i TABLE OF CONTENTS**

TABLE OF CONTENTS	i
TABLE OF EXHIBITS	ii
TABLE OF AUTHORITIES	iii
I. STATEMENT OF JURISDICTION	1
II. ASSIGNMENT OF ERRORS	2
III. ISSUES PRESENTED FOR REVIEW	3
IV. STATEMENT OF THE CASE AND ACTION OF THE TRIAL COURT	4
V. LEGAL ARGUMENT	10
A. THE DECISION BELOW IS ERROR UNDER LOUISIANA LAW GOVERNING THE LEGAL EFFECT OF AN UNRECORDED COUNTERLETTER	10
1. The decision below should be set aside under the law of recordation for unrecorded counterletters ...	10
2. The ruling below is contrary to the long-standing public policy that underlies Louisiana's law of recordation	14
B. THE DECISION BELOW IS ERRONEOUS BECAUSE THE COUNTERLETTER WAS NOT A “SALE” THAT TRIGGERED THE RIGHT OF REDEMPTION UNDER THE CONDOMINIUM DECLARATION	16
1. The counterletter was not a sale	17
2. Under its plain terms, the counterletter did not transfer an interest in the condominium	18
C. UNDER THE LAW OF REGISTRY AND CONTRACT INTERPRETATION, SUSAN STRAUSS OWNS A 100% INTEREST IN UNIT B	20
VI. CONCLUSION	21
CERTIFICATE OF SERVICE	23

***iii TABLE OF AUTHORITIES**

Cases	
<i>Avenue Plaza, L.L.C. v. Falgoust</i> , 94-2491 (La. App. 4 Cir. 4/26/95); 654 So. 2d 838	13, 15
<i>Baker v. Atkins</i> , 107 La. 490, 32 So. 69	15

<i>Banque De Depots v. Bozel Mineracao E Ferroligas</i> , 98-0742 (La. App. 4 Cir. 1/27/99); 28 So. 2d 533, <i>writ denied</i> , 99-0557 (La. 4/23/99); 742 So. 2d 882	3
<i>Blevins v. Manufacturers Record Publishing Co.</i> , 105 So. 2d 392, 414 (La. 1958)	15
<i>Chachere v. Superior Oil Co.</i> , 187 So. 321 (La. 1939)	11, 12
<i>Cimarex Energy Co. v. Mauboules</i> , 09-1170 (La. 4/9/10); 40 So.3d 931	11, 16
<i>Clovelly Oil Co., LLC, v. Midstates Petroleum Co., LLC</i> , 2012-2055 (La. 3/19/13); 112 So.3d 187	19
<i>Dallas v. Farrington</i> , 490 So. 2d 265 (La. 1986)	14
<i>Favaloro v. Favaloro</i> , 561 So. 2d 783 (La. App. 4 Cir. 1990)	20
<i>Harang v. Plattsmier et al.</i> , 21 La. Ann. 426 (La. 1869)	15
<i>Howard Trucking Co. v. Stassi</i> , 485 So. 2d 915 (La. 1986)	13
<i>Lumber Products, Inc. v. Hiriart</i> , 255 So. 2d 783 (La. App. 4 Cir. 1971)	9
<i>McDuffie v. Walker</i> , 51 So. 100 (La. 1909)	11, 12
<i>Morgan v. Hathaway</i> , 77 So. 2d 169 (La. App. 1 Cir. 1954)	13
<i>Musso v. Aivolasiti</i> , 439 So. 2d 1184 (La. App. 4 Cir. 1983)	11, 12
<i>O'Dwyer v. Edwards</i> , 08-1492 (La. App. 4 Cir. 6/10/09); 15 So.3d 308	3
<i>Sabrier v. Leard</i> , 426 So. 2d 213 (La. App. 4 Cir. 1982)	18
<i>Stewart v. Newton</i> , 12 La. Ann. 622 (La. 1857)	15
<i>Tate v. Tate</i> , 09-2034 (La. App. 1 Cir. 6/11/10); 42 So.3d 439)	11
<i>Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.</i> , 93-2364 (La. App. 4 Cir. 10/2/96), 681 So. 2d 1292, <i>writ denied</i> , 96-2625 (La. 12/13/96), 692 So. 2d 1066	3
<i>Wede v. Niche Mktg. United States</i> , 2010-0243 (La. 2010); 52 So.3d 60	13
*iv <i>Williams v. Dunn</i> , 2006-1352 (La. App. 1 Cir. 8/29/07) 2007 La. App. Unpub.	14
LEXIS 18	
<i>Wilson v. Progressive State Bank & Trust Company</i> , 446 So. 2d 867 (La. App. 2 Cir. 1984)	18
Statutes	
La. Civ. Code art. 1839	11
La. Civ. Code art. 1841	1
La. Civ. Code art. 1947	20
La. Civ. Code art. 1985	10
La. Civ. Code art. 2028	11
La. Civ. Code art. 2030	18
La. Civ. Code art. 2033	18
La. Civ. Code art. 2439	17
La. Civ. Code art. 2442	11
La. Civ. Code art. 2480	17
La. Civ. Code art. 2567	16
La. Civ. Code art. 2625	16
La. Civ. Code art. 3338	10, 11
La. Civ. Code art. 3343	11, 13
La. Civ. Code art. 3425	18
La. Code Civ. P. art. 2083	1, 11
La. Code Civ. P. art. 2133	9
La. R.S. 9:2576	10, 11
La. R.S. 9:2721	10, 11
Other Authorities	
Act of March 24, 1810	15
Legislative Act 169	11
Constitutional Provisions	
Louisiana Constitution of 1974, Article 5, Section 10	1

*1 I. STATEMENT OF JURISDICTION

Defendants-Appellants Jon Bestoff Strauss (“Mrs. Strauss”), Jeffery Strauss (“Jeff”), and Susan Marie Carman Strauss appeal that part of the District Court's April 4, 2013 Judgment, which granted summary judgment in favor of Plaintiffs-Appellees 6126 LLC, James P. Farwell, and G. F. Gay LeBreton. The Judgment is final and appealable under [Code of Civil Procedure article](#)

1841. Appellants filed a timely Petition for Suspensive Appeal on April 19, 2013, and an Order granting the Petition was signed on the same day and security was timely posted. Thus, this Court has jurisdiction over this appeal pursuant to [Article 5, Section 10 of the Louisiana Constitution](#) of 1974 and [Louisiana Code of Civil Procedure article 2083](#).

***2 II. ASSIGNMENT OF ERRORS**

A. The trial court erred under Louisiana's long-established law of registry by making an unprecedented and legally unsupported ruling that an unrecorded counterletter affecting immovable property was effective for third parties.

B. The trial court erred under Louisiana's law of contract interpretation by ruling that the unrecorded counterletter was effective against third parties when the counterletter's express terms stated that it would not be effective unless it was recorded and, in addition, stated that it was conditioned upon other events which never occurred.

***3 III. ISSUES PRESENTED FOR REVIEW**

The issues presented for review on appeal are legal conclusions which are reviewed *de novo* by this Court without deference to the ruling below: ¹

1) Whether the District Court erred under Louisiana's law of registry by holding that an unrecorded counterletter between Mrs. Strauss and her son was a partial sale of her condominium that was effective as to third parties and, thereby, gave Plaintiffs a “right of redemption” under the Condominium Declaration.

2) Whether the District Court erred under Louisiana's law of contract interpretation by ruling that a unrecorded counterletter between Mrs. Strauss and her son was effective against Plaintiffs when the counterletter's express terms stated that it would not be effective unless (1) it was recorded and (2) other contractual requirements were met, including approval of the other condominium owners, which never occurred.

***4 IV. STATEMENT OF THE CASE AND ACTION OF THE TRIAL COURT**

This appeal addresses the legal effect of a son's generosity in caring for his **elderly** mother. Mrs. Strauss was able to purchase the condominium at issue with the **financial** help of her son Jeff. Instead of a formal loan agreement or promissory note, Mrs. Strauss and her son entered into a counterletter that allowed Mrs. Strauss to buy and own the condominium in her name indefinitely while providing her son with a means of eventually being reimbursed when his mother passed away. As discussed below, the unrecorded counterletter was not a “sale” of Mrs. Strauss' interest in the condominium and, in addition, had no effect on the Plaintiffs.

On October 31, 2002, Mrs. Strauss bought Unit B of the St. Henry Condominium located at 6126 St. Charles Avenue in New Orleans for \$1,037,500.00. The sale was subject to an existing Condominium Declaration, which gave unit owners a right of first refusal to purchase other units when offered for sale as well as a right to redeem any unit that was sold by a unit owner without giving other unit owners an opportunity to exercise their right of first refusal. ²

When Mrs. Strauss purchased Unit B, the other two units were owned by Lee and Valerie Schlesinger (Unit A) and Linda Kolb (Unit C). Both the Schlesingers and Kolb elected not to purchase Unit B, and signed waivers of their right of first refusal to purchase the unit. ³ The act of sale identified Mrs. Strauss as the sole purchaser and owner of the unit and was recorded in the public records of Orleans Parish. ⁴

*5 Mrs. Strauss' son, Jeff, helped his mother pay for the unit. On the same date as the act of sale, Mrs. Strauss signed a counterletter to her son which recognized his assistance and sought to allow him to be eventually reimbursed.⁵ The counterletter acknowledged that Mrs. Strauss acquired an undivided 100% interest in the condominium, Mrs. Strauss paid all of the consideration to buy the unit, and her son had given her \$500,000 to help purchase the unit. It declared that Jeff had an undivided 48.2% interest in the condominium "and the recordation by any party of this counter letter shall act as a transfer and conveyance of the 48.2% interest" to Jeff's separate estate "without the need to execute any further documents."⁶ Mrs. Strauss also gave Jeff an option to buy her remaining 51.8% interest in the unit upon her death. However, the counterletter did not obligate Mrs. Strauss to repay \$500,000 to her son and the transaction was not described as a sale.

Of importance to this case, the counterletter was not an attempt to circumvent the Condominium Declaration. To the contrary, it acknowledged that any transfer from Mrs. Strauss to her son was conditional, stating:

The rights granted in this Counter Letter are subject to approval of the owners of the other two units in the St. Henry condominium, and their waiver of their rights of first refusal after determination of fair market value is made.⁷

Jeff signed the counterletter on November 20, 2002. The counterletter has never been recorded by Mrs. Strauss, her son, or anyone else.

After Mrs. Strauss purchased Unit B, Units A and C were sold. Unit A was sold in 2008 to Plaintiff 6126, L.L.C.,⁸ and Unit C was sold in 2005 to Plaintiffs James Farwell and G. F. Gay Lebreton.⁹

*6 From 2002 until January 2012, Mrs. Strauss lived by herself in Unit B. She paid the property taxes, condominium fees, maintenance costs and other expenses relating to the unit.¹⁰ Her son resided out of state. He neither sought nor received any payment from his mother toward the \$500,000 that he had provided her to buy the unit.

In the fall of 2011, Mrs. Strauss became partially physically incapacitated, and moved to an assisted living facility in January 2012 at the age of 79. When she realized that her health would not permit her to return home, Mrs. Strauss took steps to transfer her unit to Jeff's family. Neither Mrs. Strauss nor her son claimed that the counterletter had nullified the other owners' right of first refusal. Likewise, Mrs. Strauss and Jeff did not believe that the counterletter was a sale of an interest in Unit B to Jeff.¹¹ Accordingly, on April 11, 2012, Mrs. Strauss sent a letter to Plaintiffs stating that she would like to transfer her interest in Unit B to her children by a sale to Jeff and asked Plaintiffs to waive their right to purchase the unit pursuant to the right of first refusal in the Condominium Declaration.¹² This request was consistent with the counterletter, which stated that a transfer of an interest in the unit to Jeff was subject to approval by the other unit owners.¹³

On April 13, 2012, Jeff had a chance encounter with an owner of 6126 L.L.C. and, according to that owner, stated that he owned one-half of Unit B.¹⁴ Jeff has never denied the existence of the counterletter but does not recall stating on April 13 or any other time that he already owned an interest in the unit.¹⁵ *7 Plaintiffs began pressing Mrs. Strauss for information. They sent

letters dated April 13 and 17, 2012. Then, on April 26, 2012, two Plaintiffs appeared at her assisted living facility to question her and demand documents.¹⁶ Plaintiffs allege that Mrs. Strauss made a statement to the effect that her son owned one-half of Unit B. On April 30, Plaintiffs had their counsel send a demand letter for documents relating to the transaction between Mrs. Strauss and Jeff.¹⁷ The letter noted Jeff Strauss' alleged statement that he owned an interest in Unit B was inconsistent with Mrs. Strauss' request for Plaintiffs to waive their rights of first refusal so she could sell the unit to him. This observation was accurate irrespective of Plaintiffs' zealous efforts to characterize discussions with the Strausses as evidence of a sale, the simple facts are that Mrs. Strauss would not have requested waiver of their rights of first refusal if a sale to Jeff had already occurred, the counterletter's conditions for a transfer to Jeff did not occur, and the Strausses did not consider the counterletter as a sale to Jeff even between themselves, much less as to Plaintiffs.¹⁸

On May 9, 2012, Mrs. Strauss' attorney sent a copy of the counterletter to Plaintiffs' counsel.¹⁹ One day later, Plaintiffs responded through their attorney, taking the position that the unrecorded counterletter was a sale to Jeff and, therefore, they were entitled to exercise the right of redemption in the Condominium Declaration and take title to 48.2% of Unit B by paying \$500,000 to Jeff.²⁰ They also stated their intent to exercise Jeff's option to buy 51.8% of Unit B "at her death, for its fair market value," although the option was not exercisable since Mrs. Strauss was alive. This position was completely at odds with the *8 purpose of the counterletter, which was to provide Mrs. Strauss with a means of owning the unit while protecting Jeff by providing him with a means of eventual reimbursement upon Mrs. Strauss' death.²¹

Faced with Plaintiffs' response, Mrs. Strauss transferred Unit B by a donation. The Condominium Declaration did not prohibit a unit owner from donating his unit without the consent of the other unit owners. On May 7, 2012, Mrs. Strauss donated all of her interest in Unit B to Jeff's wife, Susan Strauss ("Susan"), as her separate property.²² The act of donation was recorded in the conveyance records of Orleans Parish.²³ Unit B has not been used since Mrs. Strauss moved out except for occasional stays in Unit B by Jeff and Susan's family.

Unhappy with the donation, the Plaintiffs filed this lawsuit against Mrs. Strauss, her son and his wife Susan in an attempt to obtain ownership of Unit B from the Strauss family. They claim that the 2002 counterletter - made years before they became unit owners and never recorded - was a "sale" of 48.2% of Unit B to Jeff that triggered the "right of redemption" provision in the Condominium Declaration. They also claim that they had the right to "buy" a 48.2% interest for \$500,000, inaccurately characterizing Jeff's assistance to his mother as a "price" paid for an interest in the unit.

The counterletter never stated that anything was sold to Jeff and provided that its terms (including the transfer of the 48.2% interest) were subject to both recordation and approval by the other owners to be effective. Nonetheless, the trial *9 court ruled by summary judgment, without written reasons, that the unrecorded counterletter was effective as to third parties including Plaintiffs and constituted a "sale" that triggered a right of redemption for the Plaintiffs.²⁴ The trial court also granted summary judgment holding that Plaintiffs did not have a right of redemption with respect to the 51.8% interest in Unit B which Mrs. Strauss donated to Susan, or to acquire that interest through the language in the counterletter stating Jeff could buy that interest upon Mrs. Strauss' death subject to the other owners' rights of first refusal.²⁵ These other rulings were not appealed; thus, the only ruling on appeal before this Court is the ownership of the remaining 48.2% interest in Unit B.²⁶

The ruling below transformed an agreement between a mother and her son that helped her buy a residence into a "sale" effective in 2002, although Jeff never lived in the residence after the supposed "sale" and never exercised any rights remotely consistent

with an ownership interest in the unit. Left undisturbed, the ruling allows Plaintiffs to pay \$500,000 for 48.2% of Unit B based on a 2002 agreement, causes the unit to be partitioned and sold, and allows Plaintiffs to enjoy a profit based on the difference between \$500,000 and the significantly higher current value of the 48.2% interest. The Strauss family never contemplated or intended this result when the unrecorded counterletter was made to help Mrs. *10 Strauss buy the condominium, and the holding of the trial court should be reversed based on the record and the law for the reasons discussed below.

V. LEGAL ARGUMENT

A. THE DECISION BELOW IS ERROR UNDER LOUISIANA LAW GOVERNING THE LEGAL EFFECT OF AN UNRECORDED COUNTERLETTER

[Louisiana Civil Code article 1985](#) declares that “[c]ontracts may produce effects for third parties only when provided by law.” Under centuries of Louisiana registry law, unrecorded counterletters and unrecorded agreements have no effects for third parties. The decision below deviates from this long-standing law by holding that the unrecorded counterletter affected the ownership of Mrs. Strauss' condominium as to the Plaintiffs. That decision is erroneous and should be reversed under the law of recordation governing coterletters, sales of immovable property, and transfers of immovable property.

1. The decision below should be set aside under the law of recordation for unrecorded counterletters.

Under the general law of registry in Louisiana, the rights and obligations established or created by an instrument that transfers an immovable or establishes a real right in or over an immovable are without effect as to a third person unless the instrument is registered by recording it in the appropriate mortgage or conveyance records. [La. Civ. Code art. 3338](#).²⁷

*11 This law specifically applies to counterletters:

Counterletters can have no effects against third persons in good faith. Nevertheless, if the counterletter involves immovable property, the principles of recordation apply with respect to third persons.

[La. Civ. Code art. 2028](#). (emphasis added)

The principles of recordation referenced in [article 2028](#) are long-standing and easily summarized: “[i]f a counter letter affecting immovable property is unrecorded, it can have no effect as to third persons, irrespective of their knowledge of the counterletter or good faith.” Comment (c) to [Article 2028](#) (citing *McDuffie v. Walker*, 51 So. 100 (La. 1909); *Chachere v. Superior Oil Co.*, 187 So. 321 (La. 1939); *Musso v. Aivolasiti*, 439 So. 2d 1184 (La. App. 4 Cir. 1983); and *Tate v. Tate*, 09-2034 (La. App. 1 Cir. 6/11/10); 42 So.3d 439). A third person is a person who is not a party to or personally bound by an instrument. [La. Civ. Code art. 3343](#).

Classifying the counterletter as a sale or, more generally, a transfer of immovable property does not change the effect of non-recordation. [Civil Code article 1839](#) is titled “Transfer of immovable property” and states, in relevant part: “[a]n instrument involving immovable property *shall have effect against third persons only from the time it is filed for registry in the parish where the property is located.*” (emphasis added). Likewise, the law of registry for a sale of immovable property is set forth in [Civil Code article 2442](#) and provides:

*12 The parties to an act of sale or promise of sale of immovable property are bound from the time the act is made, but *such an act is not effective against third parties until it is filed for registry according to the laws of registry.* (emphasis added).

As a result, an unrecorded counterletter has no effect upon third parties regardless of whether the law of registry governing counterletters, sales of immovable property, or general transfers of immovable property is applied. See *Musso v. Aiavolasiti*, 439 So. 2d 1184, 1186 (La. App. 4 Cir. 1983) (“An unrecorded document affecting immovable property is not binding upon third parties. Whether [the third party] knew of the document is irrelevant in the present case because the document is not binding upon him.”); see also, *Chachere v. Superior Oil Co.*, 187 So. 321, 321 (La. 1939) (“It is the well settled jurisprudence of this state that third persons dealing with immovable property have a right to depend upon the faith of the recorded title thereof and are not bound by any secret equities that may exist”). Simply put, an unrecorded contract affecting immovable property “shall be utterly null and void, except between the parties thereto.” *McDuffie v. Walker*, 51 So. 100, 105 (La. 1909) (unrecorded contract affecting immovable property has no effect as to third persons, even when a third person has actual knowledge of that unrecorded contract).

Tested against the law of recordation, the counterletter never transferred any of Mrs. Strauss's interest in Unit B as to the Plaintiffs. It is undisputed that:

1. Mrs. Strauss was the owner of record of Unit B when the counterletter was created.²⁸
2. The Plaintiffs are not parties to the counterletter.²⁹
3. The only parties to the counterletter are Mrs. Strauss and her son.³⁰
4. The counterletter was *never* recorded.³¹

*13 Plaintiffs are plainly third parties to the counterletter. La. Civ. Code art. 3343 (“A third person is a person who is not a party to or personally bound by an instrument.”). And as to third parties like Plaintiffs, Mrs. Strauss did not transfer any interest in Unit B through the counterletter because the counterletter was never recorded. As a matter of law, the counterletter was not a “sale” or transfer of interest in Mrs. Strauss' unit as to Plaintiffs and, therefore, Plaintiffs' rights of redemption under the Condominium Declaration were not triggered.

The law of recordation's application is not affected by extraneous statements about ownership, such as the remarks allegedly made by Mrs. Strauss and her son to Plaintiffs in 2012 to the effect that Jeff had an interest in Unit B. First, these conversations are of no consequence because the law of registry is unaffected by the parties' beliefs or knowledge. *Wede v. Niche Mktg. United States*, 2010-0243, p. 5 (La. 2010); 52 So.3d 60, 63 n.6 (noting “well-established consequence” of the public records doctrine that “an unrecorded contract affecting immovable property has no effect as to third persons, even when a third person has actual knowledge of that unrecorded contract”). Second, the legal effect of an instrument is ultimately controlled by the law, not its characterization by a party.³² Third, despite being irrelevant to Plaintiffs, these statements were arguably accurate as between Mrs. Strauss and her son because a counterletter is effective between the parties to the counterletter although it has no effect as to third parties. See, *Morgan v. Hathaway*, 77 So. 2d 169, 173 (La. App. 1 Cir. 1954) (Cavanaugh, J., concurring) (“An unrecorded counter letter can have no effect except between the parties. But a counterletter is nonetheless effective between the parties because it is under private signature.”); *Avenue Plaza, L.L.C. v. Falgoust*, 94-2491, p. 3 (La. App. 4 Cir. 4/26/95); 654 So. 2d 838 839 (“the Louisiana Supreme Court set *14 forth that the public records doctrine is essentially a negative doctrine and what is not recorded is not effective except as between the parties and, the actual knowledge by third parties of unrecorded interests is immaterial. *Dallas v. Farrington*, 490 So. 2d 265, 269 (La. 1986).”).

For example, if Mrs. Strauss had sold Unit B to a Plaintiff after 2002, Jeff could not have used the unrecorded counterletter to claim an ownership in the unit against the purchasing Plaintiff, even if everyone was fully aware of the counterletter before the sale took place. And in that case, the purchasing Plaintiff would cloak itself in the public records doctrine to establish that the counterletter did not effect a sale of an interest in Unit B to Jeff because it was never recorded. See, *Williams v. Dunn*, 2006-1352 (La. App. 1 Cir. 8/29/07); 2007 La. App. Unpub. LEXIS 18 (where plaintiffs were “true owners” of a house under

the terms of an unrecorded counterletter and sued mortgage companies to cancel mortgages granted by the owner of record, plaintiffs' ownership claims were dismissed on summary judgment because unrecorded counterletter had no effect on third parties including mortgage companies).

The lower court did not apply the law of recordation in its ruling. Its omission resulted in an erroneous finding that the unrecorded counterletter was effective against Plaintiffs and transferred an interest in Unit B from Mrs. Strauss to Jeff. This ruling contravenes centuries of Louisiana registry law that require counterletters, sale agreements for immovable property, and agreements transferring interests in immovable property to be recorded in order to have any effect on third parties. Therefore, the decision is erroneous and should be reversed.

2. The ruling below is contrary to the long-standing public policy that underlies Louisiana's law of recordation.

Unrecorded instruments regarding immovable property have had no effect on third parties since before Louisiana entered the Union in 1812. *See, e.g.*, Act of *15 March 24, 1810, c. 25, § 7, (act concerning immovable property has no effect against third persons until recorded in the office of the judge of the parish where such immovable is situated). Over 150 years ago, the Louisiana Supreme Court noted this principle, explaining that “[i]f a private counter-letter could, at any time and as to all the world, defeat the most formal title in the archives of the Recorder's office, their authentic acts would be mockeries, and registry offices become pitfalls for the unwary.” *Stewart v. Newton*, 12 La. Ann. 622, 623 (La. 1857). In *Harang v. Plattsmier et al.*, 21 La. Ann. 426, 427 (La. 1869), the Supreme Court found: “[A]ll sales, contracts and judgments which shall not be so recorded shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of recording. This is the last expression of the legislative will upon the subject, and it is clear, precise, and contains no exception or qualification. Whether the laws be good or bad is immaterial. Courts are bound by them and must determine the rights of litigants in accordance with their provisions.” (internal citations and quotations omitted).

A hundred years later, the law remained unchanged. The Louisiana Supreme Court reiterated that “it is the public policy of this state that in order to affect third parties, all transactions touching upon or affecting title to real or immovable property must be recorded. As stated in the case of *Baker v. Atkins*, 107 La. 490, 32 So. 69, 70, ‘there can be no actual owner of immovable property, so far as third persons are concerned, other than the owner of record.’” *Blevins v. Manufacturers Record Publishing Co.*, 105 So. 2d 392, 414 (La. 1958).

This Court continues to apply the law of recordation as it has always existed. *Avenue Plaza, L.L.C. v. Falgoust*, 94-2491 (La. App. 4 Cir. 4/26/95); 654 So. 2d 838 (affirming eviction of lessees by purchaser when lessees with pre-sale recorded lease executed an option to renew the lease with seller but had failed to *16 record the option and the purchaser was a non-party to the lease); *c.f.* *Cimarex Energy Co. v. Mauboules*, 09-1170 (La. 2010); 40 So.3d 931 (applying public records doctrine).

No case has been found which holds that an unrecorded counterletter purporting to transfer an interest in immovable property has an effect upon third parties. The Louisiana Civil Code, centuries of jurisprudence, and the policy that underlies Louisiana's law of registry reject the holding below. The ruling below is without precedent in law and violates the principles that underlie Louisiana's public records doctrine. The Strausses respectfully submit that the decision is legal error and should be set aside.

B. THE DECISION BELOW IS ERRONEOUS BECAUSE THE COUNTERLETTER WAS NOT A “SALE” THAT TRIGGERED THE RIGHT OF REDEMPTION UNDER THE CONDOMINIUM DECLARATION.

The “right of redemption”³³ contained in the Condominium Declaration only applies if a “sale” of a unit takes place. The Declaration provides, in pertinent part:

Right of Redemption

In the event that the Owner of a Unit shall...sell such Unit without giving written notice to the Association as provided herein to the end that the other Unit Owners are not individually afforded the opportunity to determine whether or not any one of them will elect to lease or purchase said Unit prior to the consummation of such... Purchase and on the terms and provisions thereof, then any of the other Unit Owners shall have the right to redeem said Unit from such...sale transaction by ... refunding unto the purchaser of such Unit the purchase price paid therefore,, in which latter event, the purchaser of such Unit shall convey the title to such unit to the electing Unit Owner.³⁴

***17** In this case, the counterletter did not trigger the redemption provision or right of first refusal because it was not a “sale” as a matter of law.

1. The counterletter was not a sale.

As an initial matter, the counterletter was not a sale as to Plaintiffs because it was not recorded for the reasons discussed hereinabove. An unrecorded counterletter has no effect as to third persons and therefore was not a transfer of any type of an interest in the Unit as to the Plaintiffs, much less a sale of an interest.

In addition, the counterletter does not qualify as a “sale” under the definition of a sale. A sale is a contract whereby a person transfers ownership of a thing to another for a price in money. [La. Civ. Code art. 2439](#). The thing, the price, and the consent of the parties are requirements for the perfection of a sale. *Id.* In this case, the counterletter does not state that Mrs. Strauss was selling an interest in Unit B. It does not state that her son acquired an interest in Unit B for a specific price. It does not give her son any right to use the condominium. It did not obligate her son to maintain the condominium or pay taxes. The counterletter did not look like a sale or function like a sale because it was not a sale. Instead, it was a contract that was intended to recognize that Jeff had helped his mother purchase a residence and to provide him with a means of being reimbursed. Because the counterletter does not contain the elements required for a “sale,” it was not a sale and never triggered the Plaintiffs' redemption rights under the Condominium Declaration.

Furthermore, the counterletter was not a sale because it did not cause possession of the unit to be transferred from Mrs. Strauss to her son. [Civil Code article 2480](#) states: “When the thing sold remains in the corporeal possession of the ***18** seller the sale is presumed to be a simulation.” A simulated sale is an absolute nullity. [Wilson v. Progressive State Bank & Trust Company](#), 446 So. 2d 867 (La. App. 2 Cir. 1984). Corporeal possession is the exercise of physical acts of use, detention, or enjoyment over a thing. [La. Civ. Code art. 3425](#). As explained by this Court: “[p]ossession is retained by the vendor where the sale produces no change in the dominion or control of the property, as where the vendor continues to collect rents from the property with the consent of the vendee, or where the vendor gives every appearance of retaining ownership by paying property taxes and making repairs or improvements. Under such circumstances, the presumption of simulation may be brought to bear against the transaction by which the vendor ‘conveyed’ the property.” [Sabrier v. Leard](#), 426 So. 2d 213, 216 (La. App. 4 Cir. 1982) (finding prima facie case of simulated conveyance where “vendor” paid property taxes, paid for insurance, obtained repairmen, bore the cost, received rents, and managed the property).

In this case, Mrs. Strauss maintained exclusive corporeal possession of Unit B. She resided in Unit B by herself until she moved in 2012. She paid all taxes, insurance, maintenance, repairs, condominium fees and other expenses related to Unit B.³⁵ Thus, even if the unrecorded counterletter is mischaracterized as a sale, it was a simulation and absolute nullity that had no effect on Plaintiffs because the counterletter never affected Mrs. Strauss' sole possession and control of the unit.³⁶

2. Under its plain terms, the counterletter did not transfer an interest in the condominium.

Whether the counterletter was a sale or otherwise transferred an interest in the unit is controlled by its terms under Louisiana's law of contract interpretation. Contracts have the effect of law for the parties and the interpretation of a contract ***19** is the

determination of the common intent of the parties. *Clovelly Oil Co., LLC, v. Midstates Petroleum Co., LLC*, 2012-2055, p. 5 (La. 3/19/13); 112 So.3d 187, 192. The reasonable intention of the parties to a contract is to be sought by examining the words of the contract itself, and not assumed. *Id.* Furthermore, “[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties’ intent. Common intent is determined, therefore, in accordance with the general, ordinary, plain and popular meaning of the words used in the contract.” *Id.* Accordingly, “when a clause in a contract is clear and unambiguous, the letter of that clause should not be disregarded under the pretext of pursuing its spirit, as it is not the duty of the courts to bend the meaning of the words of a contract into harmony with a supposed reasonable intention of the parties.” *Id.*

In pertinent part, the counterletter states:

Appearer, JON BESTHOFF STRAUSS, declares that the separate estate of JEFFRY B. STRAUSS has an undivided 48.2 percent ownership in said property and the recordation by any party of this Counter Letter shall act as a transfer and conveyance of that 48.2 percent interest to the separate estate of JEFFRY B. STRAUSS without the need to execute any further documents. Appearer, JON BESTHOFF STRAUSS, further declares that the separate estate of JEFFRY B. STRAUSS is granted an option to buy her 51.8 percent interest in said property at her death, for its fair market value. The rights granted in this counter letter are subject to approval of the owners of the other two units in St. Henry condominium, and their waiver of their rights of first refusal after a determination of fair market value is made.

Under these terms, the counterletter required several things to happen before the transfer to Jeff was complete. First, the counterletter had to be recorded by Mrs. Strauss or her son in order for a transfer and conveyance to occur. It is undisputed that this has never occurred. Second, any “right granted by the counterletter” by Mrs. Strauss was subject to approval by the owners of the other two units and their *20 waiver of their rights of first refusal. The transfer of an interest to Jeff was a “right granted by the counterletter” and, thus, it had to be approved by the other owners. It is undisputed that none of the other owners approved the transfer of the 48.2% interest from Mrs. Strauss to her son or waived their rights of first refusal. To the contrary, it is undisputed that the Plaintiffs, as the current owners of the other units objected to the transfer of the 48.2% interest to Jeff Strauss.

As a result, the conditions set forth in the counterletter for Mrs. Strauss to complete her transfer of a 48.2% interest in her unit to Jeff have never been satisfied. The counterletter has not transferred an interest to Jeff, much less caused a “sale” that triggered the Plaintiffs’ right of redemption.³⁷ See, *La. Civ. Code art. 1947* (when “the parties have contemplated a certain form, it is presumed that they do not intend to be bound until the contract is executed in that form.”).

C. UNDER THE LAW OF REGISTRY AND CONTRACT INTERPRETATION, SUSAN STRAUSS OWNS A 100% INTEREST IN UNIT B.

On May 7, 2012, Mrs. Strauss donated “all of [her] right, title and interest in and to” Unit B to Susan.³⁸ The judgment below held that Mrs. Strauss’ donation of all of her interest in Unit B to Susan was “valid and effective and binding on the plaintiffs,” and that as a result, Plaintiffs had no option to purchase the donated interest.³⁹ This ruling has not been appealed, and is correct as to the validity of the donation.

*21 The “interest” donated by Mrs. Strauss on May 7, 2012 was actually a 100% interest in Unit B. As discussed above, the unrecorded counterletter did not convey any interest in Unit B from Mrs. Strauss to Jeff under the law governing registry as well as contract interpretation; Mrs. Strauss was the record owner of 100% of Unit B when the donation occurred; and, therefore, the last recorded conveyance transferring her interest - the donation of all of her interest in Unit B to Susan Strauss - has full force and effect under the law of registry and this Court should find that the donation transferred 100% of the ownership of Unit B to Susan.

VI. CONCLUSION

The counterletter recognized that Mrs. Strauss needed **financial** assistance to buy Unit B and that her son had offered to provide that assistance. It was not described as a sale or treated by Jeff or his mother as a sale. Under Louisiana's law of registry, the counterletter had no effect upon Plaintiffs because it was never recorded. Under Louisiana's law of sales and contract interpretation, the counterletter was not a sale and, as to Plaintiffs, did not transfer any interest in Unit B from Mrs. Strauss to her son that triggered their rights of redemption. That part of the decision below which granted summary judgment in favor of Plaintiffs is erroneous and should be reversed. Furthermore, Susan Strauss should be declared the sole owner of Unit B as a result of Mrs. Strauss's donation of all of her interest in Unit B to Susan in the 2012 donation that was recorded in the public records.

Appendix not available.

Footnotes

- 1 Legal questions are reviewed by appellate courts with the de novo standard of review. *O'Dwyer v. Edwards*, 08-1492, p. 3 (La. App. 4 Cir. 6/10/09); 15 So.3d 308, 310. Whether a provision of a written contract is clear and unambiguous is an issue of law and is reviewed de novo on appeal. *Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.*, 93-2364 (La. App. 4 Cir. 10/2/96), 681 So. 2d 1292, writ denied, 96-2625 (La. 12/13/96), 692 So. 2d 1066. No ambiguity in the contract at issue was found below or exists; thus, its interpretation is an issue of law and is reviewed de novo on appeal. *Banque De Depots v. Bozel Mineracao E Ferroligas*, 98-0742, p. 2 (La. App. 4 Cir. 1/27/99); 28 So. 2d 533, 541 n.1, writ denied, 99-0557 (La. 4/23/99); 742 So. 2d 882.
- 2 R. at 10-32 (Condominium Declaration Creating and Establishing Condominium Property Regime, dated May 16, 1978, registered at Book 752E, folio 117 in the conveyance records of Orleans Parish).
- 3 R. at 163-164.
- 4 R. at 161-166. (The Unit B Act of Cash Sale was filed and registered as Conveyance Office Instrument 246760 in the conveyance records of the Parish of Orleans, State of Louisiana).
- 5 R. at 40-42 (Counter Letter).
- 6 R. at 41.
- 7 R. at 41.
- 8 R. at 193. Plaintiff 6126 L.L.C.'s members apparently consist of Charles Goodyear and his wife Elizabeth.
- 9 R. at 193.
- 10 R. at 135-136, ¶ 27 (Affidavit of Mrs. Strauss).
- 11 R. at 173, ¶ 11 (Affidavit of Jeffry Strauss); R. at 136, ¶ 33 and 35 (Affidavit of Mrs. Strauss).
- 12 R. at 38-39.
- 13 R. at 41 (Counter Letter).
- 14 R. at 218, ¶ 7 (Affidavit of Elizabeth Goodyear).
- 15 If Jeff ever made any statement suggesting that he owned or co-owned Unit B, it was erroneous. R. at 174.
- 16 R. at 218, ¶¶ 9-10; R. at 219, ¶¶ 11 and 13 (Affidavit of Elizabeth Goodyear).
- 17 R. at 265-266 (April 30, 2012 Demand Letter).
- 18 R. at 173, ¶ 11 (Affidavit of Jeff Strauss); R. at 135, ¶ 23 (Affidavit of Mrs. Strauss).
- 19 R. at 268.
- 20 R. at 272 (May 10, 2012 Letter).
- 21 R. at 172-173, 110 (Affidavit of Jeffry Strauss); R. at 135, ¶ 22 (Affidavit of Mrs. Strauss).
- 22 The lower court denied Plaintiffs' motion for summary judgment to declare this donation invalid and granted the Strauss' motion to declare that the donation was valid in part, holding that Susan Strauss owned 51.8% of Unit B. See, "Exhibit 1" (Judgment dated April 4, 2013). The Judgment is also in the record, beginning at R. 490.
- 23 R. at 180-181, ¶ 15 (Affidavit of Susan Strauss); R. at 43 (Act of Donation). The Act of Donation was recorded as instrument number 511019 on May 7, 2012 in the conveyance records of Orleans Parish.

- 24 Exhibit 1 (Judgment, April 4, 2013). To the extent that oral reasons for judgment were expressed at the Hearing dated January 18, 2013, Defendants-Appellants include a transcript of the Hearing as "Exhibit 2," in accordance with Local Rule 8. The Hearing transcript is also in the record as Volume IV.
- 25 Exh. 1; R. at 491.
- 26 The validity of Mrs. Strauss' donation to Susan and dismissal of Plaintiffs' claims seeking the right to exercise the option granted by Mrs. Strauss to Jeff in the counterletter to take effect upon her death are not subject to review by this Court because they were not appealed by any party and Appellees did not answer this appeal. *See, La. Code Civ. P. art. 2133; Lumber Products, Inc. v. Hiriart*, 255 So. 2d 783 (La. App. 4 Cir. 1971) (any portion of a judgment concerning which the appellee does not complain in his answer is not before the appellate court on appeal; court has no authority to consider any portion of the judgment adverse to the appellee which had become final).
- 27 "The rights and obligations established or created by the following written instruments are without effect as to a third person unless the instrument is registered by recording it in the appropriate mortgage or conveyance records pursuant to the provisions of this Title:
- (1) An instrument that transfers an immovable or establishes a real right in or over an immovable.
 - (2) The lease of an immovable.
 - (3) An option or right of first refusal, or a contract to buy, sell, or lease an immovable or to establish a real right in or over an immovable.
 - (4) An instrument that modifies, terminates, or transfers the rights created or evidenced by the instruments described in Subparagraphs (1) through (3) of this Article."
- In the past, the public records doctrine was set forth in [La. R.S. 9:2721](#) and La. R.S. 9:2576. [Revised Statute 9:2721](#) provided: "No sale, contract, counter letter, lien, mortgage, judgment, surface lease, oil, gas or mineral lease or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where the land or immovable is situated; and neither secret claim or equities nor other matters outside the public records shall be binding on or affect such third parties."
- [Revised Statute 9:2576](#) provided: "All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording. The recording shall have effect from the time when the act is deposited in the proper office, and indorsed by proper officer."
- Louisiana law relative to registry was restated and revised by the legislature in 2005 by Act 169, which repealed [R.S. 9:2721](#), and set forth the public records doctrine in [Civil Code article 3338](#). *Cimarex Energy Co. v. Mauboules*, 09-1170 p. 18-19 (La. 4/9/10); 40 So.3d 931, 943-944.
- 28 R. at 161.
- 29 R. at 40-42 (Counter Letter).
- 30 R. at 40-42 (Counter Letter).
- 31 R. at 135, ¶ 21 (Affidavit of Mrs. Strauss).
- 32 *See, Howard Trucking Co. v. Stassi*, 485 So. 2d 915, 918 (La. 1986) ("Questions of law cannot be confessed or admitted; the characterization of the contracts in issue is preeminently of that nature.").
- 33 Although termed a "right of redemption," the Condominium Declaration actually provides for specific performance of the right of first refusal. A "right of redemption" is a seller's right to take back the thing from the buyer ([La. Civ. Code art. 2567](#)), whereas when a party agrees to not sell a certain thing without first offering it to a certain person, "[t]he right given to the latter in such a case is a right of first refusal that may be enforced by specific performance." [La. Civ. Code art. 2625](#).
- 34 R. at 19. Likewise, a "sale" is required before a unit owner has a right of first refusal: "should the owner of any Unit be desirous of leasing or selling such Unit, each other Unit Owner is hereby given and granted the right of first refusal to lease or purchase such Unit, as the case may be ..." R. at 18 (Condominium Declaration).
- 35 R. at 135-136 (Affidavit of Mrs. Strauss).
- 36 An absolute nullity has no legal effect for the parties to the contract as well as third parties. [La. Civ. Code arts. 2030, 2033](#).
- 37 This Court has noted the limited effect of an unrecorded counter letter and that it only created personal rights between Mrs. Strauss and her son that had no effect on Plaintiffs: "The use of a counter-letter to transfer the promise of ownership is a common practice in Louisiana, which creates rights between the transferor and the transferee. However, a person who receives a counter-letter purporting to convey an interest in immovable property receives only a personal right which may be asserted against the transferor, not an actual ownership right in the property. Essentially, the recipient of a counter-letter receives only the right to sue the transferor for ownership and an accounting." *Favaloro v. Favaloro*, 561 So. 2d 783 (La. App. 4 Cir. 1990).
- 38 R. at 126 (Act of Donation).

39 Exh. 1; R. at 491.

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.